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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

Supreme Court, U.S.
FILED
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JOHN F. DAVIS, CLERK

No. 66

ANGHEL GOLDSTEIN, a/k/a Andrei Pietraru, IULIU NASTA, a/k/a Julius Nasta and GHEORGHE FUNDI, on behalf of themselves and all others similarly situated,

Appellants,

vs.

JOSEPH A. COX and SAMUEL DIFALCO,
Surrogates of the County of New York,

EDWARD F. SILVER,
Surrogate of the County of Kings,

CHRISTOPHER C. MCGRATH,
Surrogate of the County of Bronx,

JOHN T. CLANCY,
Surrogate of the County of Queens,

ARTHUR LEVITT,
State Comptroller,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEES

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Attorney General of the
State of New York
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Press of Fremont Paynt, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

TABLE OF CONTENTS

	PAGE
Jurisdiction	2
The Statute Involved	2
Question Presented	3
Statement	3
Opinion Below	6
ARGUMENT—The District Court correctly held that the plaintiffs herein had failed, in support of their summary judgment motion, to show that New York Surrogate's Court Act, § 2218, is being *applied* unconstitutionally	8
Conclusion	12
Appendix	13

TABLE OF CASES

Bjarsch v. DiFalco, U.S.D.C., S.D.N.Y., 68 Civ. 4216	2
Braier, Matter of, 305 U. S. 148	7
Brown v. Lefkowitz, 365 U. S. 842	10
Clark v. Allen, 331 U. S. 503	3, 6
Goldstein v. Cox, 389 U. S. 581	3
Goldstein v. Cox, 391 F. 2d 586	3
Gorun v. Fall, 393 U. S. 398	2

PAGE

Ioannou v. New York, 371 U. S. 30 7,9

Ioannou v. New York, 391 U. S. 604 6,9

Irving Trust Co. v. Day, 314 U. S. 556 6,11

Kalmane v. Green, 346 U. S. 802 7

Kina, Matter of, 23 N Y 2d 720, aff'g 29 A D 2d 563 5

Krasowski, Matter of, 22 N Y 2d 827 5

Krasowski, Matter of, 28 A D 2d 180 5

Leikind, Matter of, 22 N Y 2d 346 .....4, 5, 7, 8, 9

Marek, Matter of, 11 N Y 2d 740 7

Marek, Matter of, 161 N.Y.L.J. No. 97, p. 15 col. 7, May 19, 1969 9

Menschefrend, Matter of, 283 App. Div. 463, aff'd 8 N. Y. 2d 1093 10

Menschefrend, Matter of, 150 N.Y.L.J. No. 5, p. 7, col. 5, July 8, 1963 10

Moscow Fire Ins. Co. v. Bank of New York, 280 N. Y. 286 10

United States v. First National City Bank, 396 F. 2d 897 11

United States v. Fox, 94 U. S. 315 6,11

United States v. Moscow Fire Ins. Co., 309 U. S. 624 10

Utassi, Matter of, 15 N Y 2d 436 6,10

Zschernig v. Miller, 389 U. S. 429 ....2, 3, 4, 5, 6, 7, 8, 9, 13

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McKinney's Consolidated Laws of New York, Abandoned Property Law, Book 2½, p. iii 10

McKinney's Session Laws of New York, 1968, Vol. 2, pp. 2326-2327 2

REGULATION

PAGE

Treasury Regulation and List 6, 11
Treasury Regulation, 31 C.F.R. 211-3 14

STATE DEPARTMENT LETTER

Letter dated June 13, 1968, to *amicus* from George S. Knight, Chief, Division of Property Claims, Estates and Legal Documents of United States Department of State 11, 13-15

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No. 66

Anghel Goldstein, a/k/a Andrei Pietraru, Iuliu Nasta, a/k/a Julius Nasta and Gheorghe Fundi, on behalf of themselves and all others similarly situated,

Appellants,

vs.

Joseph A. Cox and Samuel DiFalco,
Surrogates of the County of New York,

Edward F. Silver,
Surrogate of the County of Kings,

Christopher C. McGrath,
Surrogate of the County of Bronx,

John T. Clancy,
Surrogate of the County of Queens,
Arthur Levitt,
State Comptroller,

Appellees.

On Appeal From the United States District Court for the Southern District of New York.

BRIEF FOR APPELLEES

Jurisdiction

This Court noted probable jurisdiction herein on April 28, 1968.

Although this acceptance of jurisdiction might be deemed to be inconsistent with the Court's refusal to note jurisdiction in *Gorun* v. *Fall,* 393 U. S. 398 (1969), where it declined to review the denial of a similar summary judgment motion by the District Court of Montana, and although this Court, on its own motion, upon thorough consideration of this sparse record, may conclude that it has improvidently noted jurisdiction herein, we shall brief this appeal as one properly here for review. We note, however, that since the complaint herein has not been dismissed, the Court need not be concerned here with the issues of federal judicial administration or abstention which gave concern to the dissenting judges in *Gorun* (See 393 U. S. 398, 399).

The Statute Involved

New York Surrogate's Court Procedure Act, § 2218 (formerly Surrogate's Court Act, § 269a) is correctly set forth in the appellants' brief. The validity of the first section of the statute, as amended by L. 1968, ch. 998, effective June 22, 1968, was not attacked in this action. The validity of that amendment is the subject of a separate action, entitled *Bjarsch* v. *DiFalco,* U.S.D.C., S.D.N.Y., 68 Civ. 4216, in which the *amicus curiae* represents the plaintiffs attacking the validity of the amendment.*

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* The amendment was designed by the Attorney General of the State of New York to "meet some of the views" expressed by this Court in *Zschernig* v. *Miller,* 389 U. S. 429, where the Court held an Oregon statute to be unconstitutional. See McKinney's Session Laws of New York, 1968, Vol. 2, pp. 2326-2327. The amendment

(*footnote continued on following page*)

Question Presented

Whether New York Surrogate's Court Procedure Act, § 2218, *as applied*, is unconstitutional because it is an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and Congress.

Statement

(1)

When this case was before this Court (389 U. S. 581), on petition for certiorari, a "judgment" which merely refused to order the convening of a three-judge court was vacated and the case was remanded to the Court of Appeals for the Second Circuit "for further consideration in light of *Zschernig* v. *Miller*, 389 U. S. 429", decided the same day. The Court of Appeals, without further argument, but upon reconsideration, reversed the order of the District Court denying the application to convene a three-judge court and remanded the case for consideration of the constitutional issues presented by the complaint. 391 F. 2d 586. The Court of Appeals, upon such reconsideration, observed that this Court, in *Zschernig*, had interpreted *Clark* v. *Allen*, 331 U. S. 503, as being "concerned with the words of a [state] statute on its face, not the manner of its appli-

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(*footnote continued from previous page*)

provides that the New York Surrogate's Court "shall direct" payment into court of an alien's money or property where it appears that an alien legatee, distributee or beneficiary is domiciled or resident within a country to which checks or warrants drawn against funds of the United States may not be transmitted by reason of any executive order, regulation or similar determination of the United States government or any department or agency thereof, payment thereafter being permitted to the alien upon order of the surrogate or pursuant to an order or judgment of a court of competent jurisdiction. See also the minutes of the hearing before the three-judge court (p. 53).

cation"; and noted the fact that, in *Zschernig,* this Court had held that "the history and operation" of a similar Oregon statute constituted "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress". 391 F. 2d, at p. 587.

(2)

The appellants then moved, before a *single* District Court Judge, for summary judgment. By reason of the Court of Appeals order, entered upon "reconsideration upon remand by the Supreme Court of the United States", remanding the issues to a three-judge court for reconsideration, the appellees opposed assumption of jurisdiction over the issues by a single District Court judge (17-21).

On June 13, 1968, District Judge McLean notified the parties that "plaintiff's motion for summary judgment will be heard before the Court of three judges duly designated herein on June 25, 1968 "and to file all papers pertinent to the disposition of the motion" prior to the date of hearing so fixed.

On behalf of the appellees, the Attorney General filed with the three-judge court a supplemental affidavit, sworn to June 20, 1968, to show that there were issues of fact in dispute with reference to the "application" of the terms of the statute here involved which prevented the granting of the relief sought by the plaintiffs. The Attorney General, in addition, underlined the fact that the Surrogates named as defendants exercised jurisdiction in only four of the State's 62 counties; and that their decisions, like those of all the other Surrogates in the State, were reviewable by the Court of Appeals of the State, whose then very recent decision in *Matter of Leikind,* 22 N Y 2d 346 (June 14, 1968), was called to the attention of the three-judge Court, as evidence of the further fact that the highest Court of the State was cognizant of this Court's decision

in *Zschernig* and had decided the *Leikind* case in the light of the *Zschernig* decision. The Attorney General contended that the purpose of the summary judgment motion was to avoid a hearing at which evidence could be produced to show that New York's statute, constitutional on its face, was being applied in a constitutional manner. As further indication of New York's method of application of the statute, the Attorney General also called the three-judge Court's attention to the fact that the New York Court of Appeals, on the very same day it decided *Matter of Leikind (supra)*, had denied the Attorney General's motion for leave to appeal from an order of the Appellate Division, Third Department, directing the transmission of an alien beneficiary's share to Poland (*Matter of Krasowski*, 22 N Y 2d 827), and had referred to its *Leikind* decision, in denying such leave. See also 28 A D 2d 180 (3rd Dept., 1967), the decision appealed from in *Krasowski*. And see *Matter of Kina*, 23 N Y 2d 720 (Nov. 1968), aff'g 29 A D 2d 563 (2d Dept., 1967).

In *Matter of Leikind*, Judge BREITEL, writing for the New York Court of Appeals, held that the petitioner in that case had "made no showing that the lower courts in this case have currently engaged in the conduct criticized, and additionally illustrated in the footnotes of the *Zschernig* case, as interference with foreign relations" (22 N Y 2d at p. 352). New York, clearly, is cognizant, therefore, of the problem of *applying* its statute in a manner which would be federally constitutional under the tests set forth in this Court's prevailing opinion in *Zschernig*.

(3)

In support of their summary judgment motion, appellants referred only to isolated cases in which the New York Courts had applied the statute in question. In response, the Attorney General did not set forth an exhaustive list, but merely examples of cases where the New York courts

had directed transmission of payments to foreign residents to whom transmissions were found to be feasible, even in situations where the persons resided in countries which had *not* been removed from the list of countries to which, pursuant to Treasury Regulation, *federal* funds might not be transmitted (Attorney General's affidavit of June 20, 1968, paragraph 13).

The Attorney General's affidavit also noted the fact that the federal government had long recognized the power of the States to regulate the succession and distribution of the estates of persons located within the individual States. *United States* v. *Fox*, 94 U. S. 315 (1877); *Irving Trust Co.* v. *Day*, 314 U. S. 556, 562 (1942). The Attorney General, in addition, set forth his information that the State Department declined to make a judgment, as to whether in certain Soviet States, Soviet heirs do receive benefit or use or actual enjoyment of estate shares (30).

(4)

No testimony was offered by appellants upon the hearing of their motion for summary judgment. They rested upon an oral argument that this Court's decision in *Zschernig compelled* the invalidation of the New York statute, since application of the statute necessarily required an "invasion of foreign policy" (Minutes, p. 9).

Opinion Below

The three-judge District Court (KAUFMAN, McLEAN and TENNEY, JJ.) unanimously directed the denial of summary judgment. The Court's opinion, written by District Judge McLEAN, after carefully analyzing the holdings of this Court in *Clark* v. *Allen*, 331 U. S. 503 (1947), *Zschernig* v. *Miller*, 389 U. S. 429 (1968), *Ioannou* v. *New York*, 391 U. S. 604 (1968); and after reviewing the history of other litigation as to the constitutionality of this statute in *Mat-*

ter of Braier, 305 N. Y. 148 (1953), app. dism. *sub nom. Kalmanc* v. *Green*, 346 U. S. 802 (1953) and *Matter of Marek*, 11 N Y 2d 740 (1962), app. dism. *sub nom. Ioannou* v. *New York*, 371 U. S. 30 (1962), concluded that the Oregon statute before this Court in *Zschernig* had been held unconstitutional "because of the manner of its application" (p. 39). After also reviewing the decision in *Matter of Leikind*, 22 N Y 2d 346 (1968), in which Judge McLean observed that the New York Court of Appeals, too, had "read the opinion of the Court in *Zschernig* as a decision dealing with the *application* of the statute by the Oregon Courts" (italics supplied), the District Court found (pp. 40-41):

> "In the case before us there is no showing that the New York courts have engaged in the conduct criticized in *Zschernig*. There is no showing and not even any claim that the New York courts have uttered any animadversions concerning Rumania. All we are told is that two New York Surrogates have directed that the distributive shares of plaintiffs Goldstein and Fundi in New York estates be deposited in court, pursuant to the statute, and that the office of the New York Comptroller has declined to turn over certain 'abandoned properties' to persons resident in Rumania or in territories within the jurisdiction of the Soviet Union. We are not informed as to what investigation, if any, preceded these judicial and administrative decisions.
>
> "We conclude that this record is inadequate to justify this court in holding, summarily, that Section 2218 is unconstitutional under the *Zschernig* rule. Without any evidence whatever as to how Section 2218 has been applied in this case, we are unable to say that it has been applied in such a way as to interfere with the foreign relations of the United States. We interpret the Supreme Court's recent ruling denying a rehearing in *Ioannou* as at least an indication that evidence of improper application of the statute is necessary."

ARGUMENT

The District Court correctly held that the plaintiffs herein had failed, in support of their summary judgment motion, to show that New York Surrogate's Court Act, § 2218, is being *applied* unconstitutionally.

No *evidence* was offered to the District Court by the appellants in support of their summary judgment motion, although the District Court set the matter down for a hearing before it at which such evidence might have been offered. Since the burden of showing that New York courts were applying its statute unconstitutionally was upon the plaintiffs, the Attorney General did not deem it proper to undertake the burden of establishing that the statute was *not* being applied unconstitutionally. Documentation of the Attorney General's position had become unnecessary, not only because of the appellants' failure of proof, but also because the New York Court of Appeals had, only a few days before the hearing date, decided *Matter of Leikind*, 22 N Y 2d 346, in the light of this Court's decision in *Zschernig* v. *Miller*, 389 U. S. 429.

In *Matter of Leikind, supra*, Judge BREITEL concluded, for the Court of Appeals, that New York Surrogate's Court Act, § 2218 "would not be unconstitutional under the explicit rationale of the *Zschernig* case" (p. 352):

> "if the Courts of this State, in applying the 'benefit or use or control' requirements, simply determine, without animadversions, whether or not a foreign country, by statute or otherwise, prevents its residents from actually sharing in the estates of New York decedents."

The probate courts of New York are, unquestionably, controlled not only by the decisions of this Court but also by those of the New York Court of Appeals. They *must*, therefore, apply § 2218, in the constitutional manner pre-

scribed both in *Zschernig* and *Leikind*. Whatever documentation for appellants' allegation might have been *possible* prior to the *Leikind* decision, the constitutionality of New York's method of applying § 2218 must be passed upon by this Court in the light of the cautions issued by Judge BREITEL in *Leikind*.

In *Matter of Ioannou*, 371 U. S. 30 (1962), this Court declined to note jurisdiction over an attack upon New York's Surrogate's Court Act, § 269 (now renumbered as Surr. Ct. Act, § 2218). A rehearing, sought in that case on the basis of the *Zschernig* decision, was denied, 391 U. S. 604 (1968), upon representations to this Court made by the New York State Attorney General that further procedures were available in the New York State courts by way of a new application for withdrawal of the funds in *Ioannou* upon the basis of allegations of changed circumstances.* Such an application was made to the Surrogate's Court in Bronx County and was granted. The decision of Surrogate McGrath, in that case, reads simply, *Matter of Marek* (161 N.Y.L.J., No. 97, p. 15, column 7, May 19, 1969):

> "Upon the oral and documentary proof adduced at the hearing in this proceeding, the application of the assignee to withdraw funds now on deposit with the director of finance to the credit of Viktoria Miculka is granted. Settle order."

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*We need not emphasize the fact that New York's statute, unlike the escheat statute involved in the *Zschernig* case, is merely *custodial*. That distinction was observed both by the District Court, inferentially, when it stressed the fact that in *Zschernig*, this Court had noted that "the Oregon statute added to the requirement of reciprocity a new concept of confiscation" (p. 39) and in *Leikind*, where Judge *Breitel* noted for the New York Court of Appeals that the New York statute not only contained no reciprocity clause, but also that "the absence of an escheat provision . . . may be of . . . critical importance." 22 N Y 2d, at p. 351.

With relation to the custodial nature of our statute, the Court should note that even the funds involved in the leading case of

(*footnote continued on following page*)

The New York Court of Appeals has traditionally proceeded with great delicacy, wisdom and with an understanding of the limits of its function in the fields of law which touch upon international relations: *Moscow Fire Ins. Co.* v. *Bank of New York*, 280 N. Y. 286 (1939), aff'd *sub nom. United States* v. *Moscow Fire Ins. Co.*, 309 U. S. 624 (1940): with an expressed aversion for the adoption of "parochial" interpretations of foreign law: *Matter of Utassi*, 15 N Y 2d 436, 442 (1965); and with an appropriate respect for the position of the executive branch of the United States' government as to the proper interpretation to be given to subjects of international law and custom. *Republic of Argentina* v. *City of New York*, 25 N Y 2d —— (decided July, 1969).

The federal government has expressed its policy, in the form of regulations and agreements, with reference to the transmission or non-transmission of *federal* funds. If the federal government, by treaty or otherwise, expresses a similar policy or policies with respect to the transmission of the distributive shares, legacies or bequests derived from the estates of New York decedents, New York will, undoubtedly, be guided or controlled by such expressions of federal policy. We regard the appropriate formulators of our federal foreign policy to be quite capable of precisely labeling the *subject matter* with which they purport

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(*footnote continued from previous page*)

Matter of Menschefrend, 283 App. Div. 463 (1st Dept., 1954), aff'd 8 N Y 2d 1093 (1960), cert. den. *sub nom. Brown* v. *Lefkowitz*, 365 U. S. 842 (1961), were paid by New York to its proper owner when he became known and proved his claim. See *Matter of Menschefrend*, 150 New York Law Journal, No. 5, p. 7, column 5 (July 8, 1963), directing payment to a surviving alien "distributee." This result was obtained, despite the effort made, earlier in the proceedings before a New York Surrogate, by a California public administrator to subject the funds there involved, New York bank deposits of a California decedent, to California escheat procedures, upon the then uncontradicted allegation that Menschefrend had died leaving no known heirs. Our custodial statute is designed to prevent, rather than to accomplish such injustices. McKinney's Consolidated Laws of New York, Abandoned Property Law, Book 2½, p. iii.

to deal. When the Treasury List was amended to delete certain countries from the list of countries to which *federal funds might not* be transmitted, the Department found that its amendment of its regulations could be accomplished without notice and public procedure since "the amendment involves a foreign affairs function of the United States." (Brief of Amicus Curiae, p. 33). No such finding has, to our knowledge, ever been made by the Department of State, or the President, with respect to the devolution or transmission of shares of the estates of decedents of the several states. On the contrary, the *amicus curiae,* upon presenting his arguments to the District Court, conceded that the Department of State had expressly *disavowed* any intention to deal with the subject of estate devolution under state law. See the State Department letter, dated June 13, 1968, addressed to the *amicus'* law firm by George S. Knight, Chief, Division of Property Claims, Estates and Legal Documents of the United States Department of State which was annexed to the *amicus* brief submitted below (Appendix A hereto). See also *United States* v. *First National City Bank,* 396 F. 2d 897, 904 (2d Circ., 1968); and see *United States* v. *Fox,* 94 U. S. 315 (1877); *Irving Trust* v. *Day,* 314 U. S. 556, 562 (1942). The last paragraph of the State Department's letter to the *amicus* merits quotation (*infra,* p. 15).

> "Since the administration of estates is not a Federal function, the remittance of inheritances to foreign beneficiaries, including those in the Soviet Union, does not normally come to the attention of this Department. The Department of State is, therefore, not in a position to know or to make judgment, on the basis of the small number of cases of which the Department has become aware in which Soviet heirs are believed to have received benefit from remittances of estate shares, whether funds sent to persons resident in the Soviet Union from the United States are generally received by them and fully available to them for their use and benefit."

CONCLUSION

The order appealed from should be affirmed.

Dated: New York, New York
August 21, 1969

Respectfully submitted,

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Appendix

DEPARTMENT OF STATE
Washington, D. C. 20520

June 13, 1968

In reply refer to: SCS

Mr. Jerome I. Lessne
Law Offices
Wolf Popper Ross Wolf & Jones
845 Third Avenue
New York, New York 10022

Dear Mr. Lessne:

The Department has received your letter of May 27, 1968, (Your file No. Y 13622), concerning the remittance of estate funds to beneficiaries in the Soviet Union.

In the absence of an international agreement or applicable Federal laws or regulations on the subject of estates, as is the case with the Soviet Union, the administration of estates is a matter within the jurisdiction of the various States. The local court having funds to be distributed abroad is the appropriate body to determine whether in accordance with State law, distribution may be made. The court would, if pertinent, take into account the recent decision of the U. S. Supreme Court in *Zschernig* v. *Miller* in applying the State law on distribution to alien heirs in foreign countries. In *Zschernig,* the Court held invalid, as applied, an Oregon statute prohibiting the transfer of such funds to non-resident alien heirs, unless the heirs could show that reciprocity in inheritance existed in the foreign country and that they would receive full use, benefit and control of the funds. The Court held that the statute, as applied, was an unconstitutional intrusion by the State into the field of foreign affairs. What effect this

decision might have on similar statutes in other states would be determined, in the first instance, by the court of those states.

There are no Federal prohibitions on the transfer of private funds, including inheritances, to persons resident in the Soviet Union. Such transfers may be effected through banking channels.

There are Federal prohibitions (31 C.F.R. 211.3) on the transfer of Federal funds to payees in certain foreign countries, including the Soviet Union. These relate to Federal funds only and involve, in large part, considerations not relevant to remittances of private funds or other transactions involving the rights of private parties.

The Department is informed that under the foreign exchange control regulations of the Soviet Union, dollar funds are retained by the Soviet Government and the person or institutions to whom remittances are directed receive Soviet currency at a fixed rate of exchange. It might also be noted that these same reimbursements are understood to demand that permanent residents of the Soviet Union report to the Soviet authorities the acquisition of any foreign exchange assets and upon demand, must assign such assets to the Soviet Government against reimbursement in local currency.

It is also understood that inheritance funds may be received by beneficiaries in the Soviet Union through a foreign currency account usuable for purchases through the Soviet foreign trade organization "Vneshposyltorg", which is reported to have some 97 sales outlets in 34 Soviet cities, as well as a number of small sales counters in the larger hotels. Vneshposyltorg certificates issued against a foreign currency account are stated to be valid for an indefinite length of time and may be used against purchases through its sales outlets of both domestic and foreign articles reportedly at discount prices.

Since the administration of estates is not a Federal function, the remittance of inheritances to foreign beneficiaries, including those in the Soviet Union, does not normally come to the attention of this Department. The Department of State is, therefore, not in a position to know or to make judgment, on the basis of the small number of cases of which the Department has become aware in which Soviet heirs are believed to have received benefit from remittances of estate shares, whether funds sent to persons resident in the Soviet Union from the United States are generally received by them and fully available to them for their use and benefit.

Sincerely yours,

GEORGE S. KNIGHT
GEORGE S. KNIGHT
Chief, Division of Property Claims,
Estates and Legal Documents